Mohawk Tools, Inc. *and* National Industrial Workers Union, affiliated with National Federation of Independent Unions. Case 8-CA-13574

June 17, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 28, 1981, Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, but not to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mohawk Tools, Inc., Montpelier, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their union activities.

(b) Coercively interrogating any employees about their union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Naomi Turney immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Naomi Turney whole for any loss of earnings she may have suffered due to the discrimination practiced against her, in the manner provided in the section of the Administrative Law Judge's Decision entitled "The Remedy."[4]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Montpelier, Ohio, plant copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the next to the last paragraph of his Decision, the Administrative Law Judge summarized the factors upon which he relied in determining that Respondent's purported reason for discharging Turney was pretextual. However, he inadvertently failed to note his earlier finding, based upon credited testimony, that, contrary to Respondent's assertions, Turney was in fact engaged in production between 7:20 and 7:40 on the morning of February 6, 1980, as was reported on her job card.

[3] We shall issue an Order in lieu of that recommended by the Administrative Law Judge to reflect the cease-and-desist and affirmative action language traditionally used by the Board to remedy the violations found herein.

[4] Member Jenkins would award interest on any backpay due under this Order, based upon the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Naomi Turney full and immediate reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Naomi Turney whole for any loss of earnings she may have suffered due to the discrimination practiced against her, with interest.

MOHAWK TOOLS, INC.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge: This case arose upon the filing of a charge by National Industrial Workers Union (N.I.W.U. or the Union) against Mohawk Tools, Inc. (Respondent), on February 19, 1980. The complaint, issued on April 14, 1980, alleged as three separate violations of the National Labor Relations Act (the Act), that Respondent (1) unlawfully interrogated an employee concerning his union activity and made statements creating an impression of employer surveillance of union activity, in violation of Section 8(a)(1) of the Act; (2) unlawfully stated to an employee that Respondent was engaging in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act; and (3) discriminatorily discharged employee, Naomi Turney, in violation of Section 8(a)(1) and (3) of the Act.

Respondent's answer, filed on April 21, 1980, admitted the jurisdictional elements of the complaint[1] as well as the discharge of Turney, but it denied that Respondent had violated the Act.

A hearing was held on November 24 and 25, 1980, in Bryan, Ohio. Briefs were filed by both sides on January 29, 1981. Upon a review of the whole record[2] and my consideration of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

A. *Background*

Respondent Mohawk Tools, Inc., is an Ohio corporation with its principal place of business in Montpelier, Ohio, and employs approximately 300 hourly rated employees. Respondent is engaged in the manufacture of industrial machine tools. Annually, in the course of its business, Respondent receives, directly from points located outside the State of Ohio, goods or materials in excess of $50,000.

Union organizational activity began at Respondent's plant in 1976 when United Steelworkers of America unsuccessfully attempted to organize Respondent's employees. After this attempt, N.I.W.U. began their organizational activities. Two National Labor Relations Board elections were held among Respondent's hourly rated employees, the first in December 1977 and the second in January 1979. The Union was rejected in both elections. However, in the latter election, N.I.W.U. lost by only 14 votes.

B. *Alleged Unfair Labor Practices*

Interrogation. Roland Kirkendall was a rough centerless operator and leadman in the employ of Respondent. His foreman at this time was Patricia Wright. On several occasions during the latter part of 1979, Kirkendall expressed his inability to get along with Foreman Wright and asked the plant supervisor, Ed Davenport, to find a replacement and transfer him. Pursuant to these requests, around the latter part of November and beginning of December 1979, Kirkendall was called into a small conference office by Plant Superintendent Don Nicolen. Also present at this meeting were Davenport and Wright. Nicolen asked Kirkendall if he wanted to give up his position as leadman and why. Kirkendall responded, "I want to give the job up"; and explained further that "I could not get along with my foreman; we had too many problems." After this exchange, Nicolen then said, "we hear that you have been going around trying to get people to sign union cards on company time." Kirkendall answered, denying that he had engaged in that activity.

The record contains no evidence denying or rebutting this exchange between Nicolen and Kirkendall and Kirkendall appeared to be a credible witness. I, therefore, credit his testimony. The General Counsel asserts that Nicolen's statement constituted unlawful interrogation and created an impression of employer surveillance of union activity. Considering the surrounding circumstances, Nicolen's question was coercive. It attempted to elicit a serious response by Kirkendall about his union activity, and it occurred at a meeting between Kirkendall and three supervisors in a management conference office. See, e.g., *Pioneer Natural Gas Company*, 253 NLRB 17 (1980). In light of the foregoing evidence, I find that Respondent violated Section 8(a)(1) of the Act. However, this incident did not amount to creating the impression of unlawful surveillance.

[1] In its answer, Respondent neither admitted nor denied that N.I.W.U. is a labor organization within the meaning of Sec. 2(5) of the Act. However, at the subsequent hearing, Respondent stipulated that N.I.W.U. is a labor organization.

[2] The General Counsel's unopposed motion to correct transcript is granted.

Surveillance. Marion Prosser, employed by Respondent as a pointer in the saw department, testified that sometime in early February 1980, she had a conversation with her foreman, Charles Elison. Prosser's testimony referred to a statement by Elison to the effect that employees had better not report any union activities to their foreman, since he had to report such matters to Nicolen.

The General Counsel asserts that this comment created an impression of employer surveillance of union activities in violation of Section 8(a)(1) of the Act. Although Respondent offered no evidence denying or rebutting this testimony, it is clear that Prosser's recollection of the events were unclear and vague. This evidence is insufficient upon which to find a violation and I find that Respondent did not violate the Act in this instance.

Discriminatory Discharge. Naomi Turney was employed by Respondent from March 3, 1969, until February 7, 1980. At the time of her discharge, Turney was a finished grinder on the first shift, under the immediate supervision of Foreman Patricia Wright.

Since 1976, Turney was actively involved in union organization, first for United Steelworkers then, from 1977 until several months after her discharge, for N.I.W.U. Turney distributed union authorization cards, canvassed employees in their homes, and attended union meetings for both the Steelworkers and N.I.W.U. Turney was one of Respondent's 11 employees to openly assert their support for the Union by signing a letter sent to all of Respondent's employees. This letter, dated December 5, 1977, urged all employees to vote for the Union in the upcoming election, N.I.W.U.'s first Board election at Respondent's plant. Throughout her employment with Respondent, Turney continued to actively promote N.I.W.U. She wore buttons, displayed union stickers on her toolbox at work, and continued to urge fellow employees to sign union authorization cards. When N.I.W.U. began its third election campaign in August 1979, Turney was considered to be among the Union's leading activists, if not the leading activist.

On the afternoon of February 7, 1980, Wright called Turney into her office. Present at this meeting were Turney, Wright, Ed Davenport, Don Nicolen, and Jerry Pritchard. Pritchard read to Turney a statement prepared by Wright, stating in substance that on the morning of February 6, 1980, Turney had misrepresented the time spent on production. Turney's job card for February 6 showed that she began production at 7:20 a.m.[3] instead of 7:45, the time Respondent claimed she actually began production (G.C. Exh. 5; Resp. Exh. 1). Turney responded that she was working between 7:20 to 7:45 and that the time posted on her job card was correct. Pritchard informed Turney that this was falsification of records. Turney was then summarily discharged.[4]

Turney testified that on the morning of February 6, 1980, she arrived at work at 6:35, and noticed that the coffee machine was broken. She proceeded to her work area, opened her toolbox, got out her cup, and waited for the 6:45 buzzer announcing the start of the workday. After the sound of the buzzer, Turney performed the daily maintenance work on her machine and noticed that she needed a new diamond. She then went to the bathroom, washed her hands, and requested a new diamond from her foreman, Wright. Turney also gave Wright her prescription for new work glasses[5] (G.C. Exh. 4). She returned to her machine, put on the new diamond and "dressed" the wheel. Noting her starting time at 7:20, Turney put in a tool and started working. From 7:20 to approximately 7:35, Turney was working on her tools and making adjustments with a micrometer. She also went to the bathroom and got a cup of water. At around 7:35, a fellow employee, Sharon Staniski, came to Turney's work area and asked for a Tylenol tablet. Turney gave Staniski the Tylenol from her toolbox and went back to "micing" her tools.

Staniski, who impressed me as a reliable witness, corroborated Turney's testimony stating that at the time she obtained the Tylenol, Turney was in production and micing a tool. She also testified that the time of her visit was around 7:35.

Turney testified that 3 to 5 minutes after Staniski's visit, or at 7:40, another employee, Shirley Makemson, came by to get hot water from Turney, since the coffee machine was broken. After that, Turney returned to work on her tools and dressed her machine.

Makemson, in her testimony, corroborated this sequence of events, stating that after 7:15 she went to the coffee machine and discovered it was broken.[6] She went back to work, but remembering that another employee, Kay Elliott, had instant coffee, she got the coffee from Elliott and the hot water from Turney. Makemson remembered that this occurred sometime between 7:25 and 7:35, but not as late as 7:45, and that Turney was working, micing a tool.

Another employee, Mary Krontz, also testified that Turney was working at 7:30 that morning. Krontz's work area was positioned in such a way that Turney was in a direct line with the clock. She recalled getting a drink of water at 7:30, since the clock was right above the water fountain. At this time, she observed Turney working and a few minutes later she saw Staniski at Turney's work area.[7]

On the other hand, Wright testified that on the morning of February 6, she purposefully watched Turney from 6:45 until 7:45, since she had observed Turney wasting time on the morning of February 1, 1980, and had verbally warned her, "it was taking entirely too much time before that machine was in production." Wright believed that on February 1, Turney had recorded 7:20 as the starting time but that Turney actually started at 7:45 (G.C. Exh. 9). Wright wanted to "see if [she] was right or if [she] was wrong; if this was happening on a daily basis or in one day or whatever."

[3] All times mentioned hereafter are a.m., unless otherwise indicated. Respondent's employees are required to list their starting and finishing time for each job on their job card.

[4] Falsification of company records was grounds for immediate dismissal, according to Respondent's "Employee Handbook" (G.C. Exhs. 7, 13).

[5] Respondent's employees get a discount on work glasses through the plant.

[6] Makemson was sure of the time, since she is always eager to get coffee. Yet employees cannot get coffee until after 7:15.

[7] Turney and her three corroborating witnesses, Staniski, Makemson, and Krontz, were all supervised by Foreman Wright.

During this 1-hour period of observation, according to Wright, she had looked at her watch twice, once at 7:20 when she saw that Turney had completed her machine maintenance and again at 7:45 when she saw that Turney was "actively in production." At the end of Turney's shift, Wright pulled Turney's job card and discovered that Turney had recorded 7:20 as the start of production (Resp. Exh. 1). Wright promptly informed her supervisor, Ed Davenport, that Turney had falsified her job card.

Wright's recollection of Turney's actions from 7:20 to 7:45 was vague and uncertain. She recalled only that Turney went to the bathroom, to the water fountain, and talked for a few minutes to other employees. However, she could not remember the employees who had spoken with Turney, nor the specific sequence of Turney's actions. Turney's testimony, however, gave a detailed and consistent account of her actions. It was also corroborated by three credible witnesses. I, therefore, find that Turney was engaged in production between 7:20 and 7:40 on February 6.

Respondent denied any knowledge of Turney's prominent union role. However, the credible record evidence indicates that Wright, at least, was aware of Turney's union sympathies, since Wright had been a union supporter in 1977 before her promotion to foreman, had signed the 1977 union letter (G.C. Exh. 2), and had attended the same union meetings as Turney. Turney had even asked Wright to sign a union authorization card just prior to her promotion in December 1978. Wright admitted that she had become aware of union activity at Mohawk as early as 1978 or early 1979 through a conversation with leadman, Duane Ward who corroborated this admission. Wright also conceded that she had seen the N.I.W.U. sticker on Turney's toolbox.

In the fall of 1979, Turney had a conversation with Charles Elison concerning her union activity. This conversation took place about a month before Elison's promotion to foreman. Further, according to Turney, Respondent's president, Lyle Storrer, saw her union sticker on her toolbox during his usual Christmas tour of the plant in December 1979. In December 1979, the Union was in the middle of another election campaign. Turney consistently wore buttons throughout the union campaign and was one of very few employees to clearly exhibit union stickers. Storrer, Wright, and Jerry Pritchard (personnel supervisor) testified that Storrer was upset at the results of the Union's second election in January 1979 and told the supervisors that they had to get their "act together" within the year, as the Union could then petition for another election.[8] Clearly, Respondent was aware of Turney's union activities in 1979 and prior to the time of her discharge.

The General Counsel also disagrees with Respondent's position on the grounds that its treatment of Turney was inconsistent and arbitrary. For example, on August 31, 1979, Wright gave Turney a written warning for loitering and explained the reason as "too much time spent in the bathroom" (G.C. Exh. 6).[9] Turney had taken a 20-minute break in the bathroom but had failed to note this on her job card. On February 1, 1980, Wright also verbally warned Turney about wasting too much time before beginning production. Wright could give no adequate reason why Turney's conduct was treated as loitering on August 31 and as falsification on February 6, yet both occasions involved the same conduct, too much time spent away from her machine. Jerry Pritchard, personnel supervisor, stated that there was a falsification on February 6 because Turney's break should have been recorded under morning maintenance rather than under production. However, he admitted that employees were not required to separately record break time, and that he had never instructed employees that a break at the start of production should be recorded under maintenance.

There also was evidence of inconsistent treatment between employees. Employee Staniski testified that she had taken breaks right after completing maintenance and recorded it under production. Another employee, Shirley Prather, testified that Wright had given her a written reprimand on May 8, 1980, for an incorrect time on her job card. She had arrived late on a few mornings, recorded 6:45 instead of 6:40 or 6:50, and had completed a late slip. Prather received a written warning for placing the wrong time on her job card but was not accused of falsification.

In response to the question about what was the real reason for Turney's discharge, the record is clear. Respondent knew of Turney's union activity at the time of her discharge. Respondent's charge of falsification amounted to disparate treatment of Turney in relation to her past conduct and toward other employees. Pritchard, the person who made the ultimnte decision to discharge Turney, did not review her employment file before making this decision, he failed to ask Turney for the names of other employees who could corroborate her claim, and he failed to give Turney an opportunity for a detailed account of her actions. Pritchard himself had only a vague knowledge of Turney's activities and did not consider whether Turney's conduct could be deemed loitering as opposed to falsification. Finally, no consideration was given to any other forms of discipline.

On the basis of the foregoing, I find that Respondent's claim of "just cause" due to falsification of company records, in discharging Naomi Turney amounted to a disingenuous and pretextual attempt to rid itself of a union activist in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent Mohawk Tools, Inc., is and was at all material times, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, National Industrial Workers Union, affiliated with National Federation of Independent Unions, is and was at all material times, a labor organization within the meaning of Section 2(5) of the Act.

[8] A former supervisor for Respondent, Albert Watson, testified that at this meeting Storrer also stated that they knew who the union supporters were and had "a year to weed them out." Storrer, Wright, and Pritchard denied that this statement was made.

[9] Loitering is also covered in Respondent's handbook under a four-step disciplinary procedure. Loitering is defined as "excessive unauthorized time away from work station."

3. By interrogating Roland Kirkendall concerning his union activity during company time, Respondent violated Section 8(a)(1) of the Act.

4. By discharging Naomi Turney on February 7, 1980, because of her union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that Respondent be ordered to cease and desist from its unlawful practices. I further recommend that Respondent be ordered to post an appropriate notice and take affirmative action in order to effectuate the policies of the Act.

In addition, I recommend that Respondent offer Naomi Turney immediate reinstatement without prejudice to her seniority rights or other privileges and be provided with backpay and interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977)[10] and that she be made whole for any loss of pay or other benefits which she suffered as a result of Respondent's conduct found unlawful herein.

[Recommended Order omitted from publication.]

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).